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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967.

NO. 816

UNITED STATES OF AMERICA,

Appellee,

vs.

NATHAN SUESS, ~~ET AL,~~

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. AND APPENDICES.

Abraham Teitelbaum,
Attorney for Nathan Suess,
Appellant - Petitioner

506 North Rexford Drive
Beverly Hills, California

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TABLE OF AUTHORITIES CITED

Cases

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Moccio v. United States, 354 U.S. 913	8

Statutes Involved

Title 15, United States Code:

Sec. 77b. Definitions.

When used in this subchapter, unless the context otherwise requires--

* * * * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participes or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess

of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

* * * * * * *

Sec. 77c. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

* * * * * * *

Sec. 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding

in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

(as in effect from 1954 to 1964)

Sec. 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce

or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * * * * *

The Bill of Rights

Article IV Section 1. Full faith and credit shall be given in each State to the public records and judicial proceedings of every other State.

Article IV Section 2. Assures each citizen the privileges and immunities of the citizens of the several States.

Article XIV of the Amendments to the United States Constitution. No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States nor shall any State deprive any person of life,

liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967.

NO. _____

UNITED STATES OF AMERICA,

Appellee,

vs.

NATHAN SUESS, ET AL,

Appellant.

PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAY IT PLEASE THE HONORABLE JUDGES OF THE SUPREME COURT:

Petitioner Nathan Suess prays that a Writ of Certiorari issue to review and reverse the sentence of 15 months in the penitentiary imposed on March 7, 1967 by the Honorable Edmund L. Palmieri, Judge of the District Court for the Southern District of New York, and which judgment was

affirmed by the Court of Appeals for the Second Circuit on September 28, 1967. The Petition for a rehearing was denied by said Court on October 16, 1967, and this Petition for a Writ of Certiorari is brought within the statutory period.

OPINIONS BELOW

The decision of the District Court for the Southern District of New York is not reported and can be found in Appendix "A".

The opinion of the Court of Appeals for the Second Circuit will be reported in the advance sheets, and is set forth in full as Appendix "B".

JURISDICTION

The jurisdiction of this Honorable Court is invoked under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America.

QUESTIONS PRESENTED

Can a person violate the National Securities Act of 1933, when he committed no sale of any security?

Where the purported act was committed more than five years prior to an Indictment, can a person claiming immunity by pleading the Statute of Limitations, be prosecuted, tried and convicted?

Must the prosecution plead and also prove an overt act on the part of this defendant within the period of the Statute of Limitations?

Isn't Appellant Nathan Suess entitled to the equal protection of the laws as set forth in the XIV Amendment to the Constitution of the United States of America?

What overt act did Appellant Suess commit to warrant any conviction?

PRELIMINARY STATEMENT OF FACTS

The facts are quite simple and understandable. The Appellant, Nathan Suess, is innocent of any wrongdoing. He was an errand boy for a Mr. Bloom, the real owner of stock. The only fact significant to link Appellant Suess to the indictment was that Suess went to a lending institution and borrowed money on the stock and gave the proceeds to the said Mr. Bloom. Mr. Suess was neither a principal nor an agent, nor a broker for this stock.

Counsel for the Appellee in his opening statement to the Court on Page 12a of the appendix filed in the Court of Appeals stated:

"The government does not intend in this trial to prove any of the substantive counts which charge violation of Section 17 of the Securities Act."

"The next point is the conspiracy charge in the indictment which is, of course, a conspiracy to violate not

only Section 5, the sale of unregistered securities, but also Section 17."

"Also, in the interest of saving time, the Government does not intend to prove substantially a conspiracy to defraud."

"Principally this case will charge and prove a conspiracy to sell this stock without registration with the Securities and Exchange Commission." Appendix "E".

These admissions by Counsel for Appellee completely exonerates this Appellant because he neither owned nor sold any security.

The statutes set forth in this brief do not embrace this Appellant within the meaning or intent of the statutes involved.

STATEMENT

Petitioner Nathan Suess was indicted on July 14, 1964 for conspiracy, and for violating the Federal Securities Act of 1933.

Appellee admitted that Nathan Suess was not in a technical property law sense the owner of any of these worthless shares. Appellee's brief to the Circuit Court page 16.

Counsel for Appellee in their Brief to the Court of Appeals on Page 16 thereof states, "These facts, briefly summarized, more than sufficient to establish Suess' knowing participation with Schwenoha and Fox in the illegal scheme to sell the control stock to the public." No authority or reference was given. Yet, their Appendix on Page 43a, Mr. Fox, a government witness, testified as follows:

"Q. Was there any conversation as to who would share in the proceeds of any sale of stock?

A. Mr. Schwenoha and myself.

Q. What about defendant Suess?

A. I can't recall whether he would participate in that."

Query ! Is this the measure of proof sufficient to put a man into the penitentiary?

Appellant hypothicated stock belonging to a Mr. Bloom at least five years before the indictment was filed in this cause. The Government contends that another person mailed some literature concerning other stock within the statutory period. How could this Appellant Nathan Suess be affected by the acts of another, when he was neither an agent nor a co-conspirator with the said party who did the mailing? The citations given by Counsel for Appellee are not applicable to the facts at bar: The overt acts or the purported acts constituting the substantive offense committed by one acting in concert with another defendant cannot be chargeable to this Appellant.

Fiswick v. United States , 329 U.S. 211, 216 (1946).

Moccio v. United States, 354 U.S. 913 (1957)

Another Appellant, Mr. Vincent Schwenoha, has filed his petition for Certiorari in a companion case claiming that the stock involved in this case did not have to be registered since the original stock was issued prior to the enactment of the Federal Securities Act of 1933. Should this Honorable Court consider this point significant enough to grant the Writ of Certiorari in the Schwenoha case, then the Writ of Certiorari should also be issued in this cause.

Another point at this juncture is very significant. The main witness for the Government, a Mr. Joel A. Fox, testified on recross-examination as follows:

(523) * * *

Recross-examination by Mr. Rowe:

Q. Mr. Fox, you recall seeing Defendant's (524) Exhibit A which is this letter you sent to Mr. Nathan Suess?

A. Yes, I recall that.

Q. Is it a fact that you now admitted under oath that every statement in that letter is false? A. Yes, sir.

Q. Why did you mail this letter to Nathan Suess if you knew it was false? A. I believe I said earlier and I say again, Mr. Suess wanted some information that he could pass out to some of the brokers and in conjunction with Mr. Schwenoha this letter was composed bearing the statements that were made in the letter, that I made and signed and sent to Mr. Suess.

* * * * * * *

(525) * * *

Q. You deliberately gave him false information, is that correct? A. He was aware of the information.

Q. I didn't ask you that. Did you deliberately give him false information? A. Yes, sir.

CONCLUSION

In conclusion, it is respectfully urged that the District Court failed to give full faith and credit to the decisions of the Federal Courts. The lower Court erred in not dismissing the case against Appellant Nathan Suess because he commited no acts of conspiracy or any violation of the Security Act of 1933.

Petitioner has stated facts in his Petition for Rehearing in the Circuit Court in Appendix "C" which has a significant bearing on the case at bar. The Court Sua Sponte should have dismissed the case since the Statute of Limitation applies.

Appellant Suess was denied due process of law when the District Court did not order the indictment dismissed, since Appellant committed no act, overt or otherwise, within 5 years prior to the indictment filed in this cause. Appellant was not part of any conspiracy, and no person acted as his agent to bind him to some act over which he had no control.

The Statute of Limitations of five years is both a rule and by statute enacted by the Congress of the United States, effective since July 1, 1956, and the citizens of each State are entitled to the same privileges and immunities of the citizens of the several States, as guaranteed by the Constitution of the United States.

The United States Assistant District Attorney, in his opening statement, completely eliminated Appellant Suess from the case, by telling the Court that he is not attempting to prove a substantive offense or a conspiracy, but merely that stock was sold unregistered with the Security Exchange Commission. Suess did not sell any stock, and cannot be chargeable with this crime.

Petitioner, therefore, prays that this petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit be granted in order to prevent a total miscarriage of justice.

Respectfully submitted,

Abraham Teitelbaum
Attorney for Nathan Suess,
Appellant - Petitioner

CERTIFICATION

I, Abraham Teitelbaum, hereby certify that I was duly admitted to practice before the Supreme Court of the United States in 1933, and that I have caused to be prepared the above and foregoing Petition for Certiorari, and that this petition is filed in good faith and is meritorious, and that the same has not been filed for any purpose of delay.

Abraham Teitelbaum

ABRAHAM TEITELBAUM
Attorney for Petitioner Nathan Suess

APPENDIX "A"

Judgment of conviction entered in the United States District Court for the Southern District of New York on March 7, 1967 before the Honorable Edmund L. Palmieri and a Jury.

The sentence imposed upon Appellant Nathan Suess was 15 months in the penitentiary and fifteen hundred dollars fine.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 71--September Term, 1967.
(Argued September 25, 1967 Decided September 28, 1967)

Docket No. 31240

UNITED STATES OF AMERICA,

Appellee,

--v.--

VINCENT SCHWENOHA and NATHAN SUESS,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from Judgments of conviction for violating and conspiring to violate the Securities Act of 1933, 15 U.S.C. Sec. 77a, et seq.

Affirmed.

FREDERICK F. GREENMAN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, Robert G. Morvillo, Pierre N. Leval, Assistant United States Attorneys, of counsel), for appellee.

SAMUEL ROWE, New York, N.Y., for appellants.

KAUFMAN, Circuit Judge:

This appeal reveals a typical stock fraud upon the public which the Securities Act of 1933, 15 U.S.C., Sec. 77a, et seq., was designed to prevent. Vincent Schwenoha purchased in 1956 all the outstanding stock of the Belmont Divide Mining Corporation, a paper corporation that had ceased doing business in 1924. He and others devised a plan to sell this worthless stock to the public without registering it with the Securities and Exchange Commission. The corporation's name was changed to Belmont Oil Corporation, certain oil leases of unspecified value were given to the corporation to create the appearance of assets, the stock was split ten for one to create more shares to sell to the public and placed in the names of nominees to conceal the fact of control by a handful of conspirators.. Nathan Suess then joined the conspiracy and assisted in finding brokers who would sell the worthless stock to the naive and trusting public. Calling himself the public relations man for Belmont

Oil, Suess met with co-defendants Edward Cantor and Michael Canter at the office of their brokerage firm, Peerless-New York, Inc., and arranged for them to maintain a market for Belmont stock and also to sell the stock to the public. These and other brokers sold Belmont to the public for about one dollar per share by typical boiler-room methods. Eight co-defendants pleaded guilty;[1] appellants were convicted by a jury of conspiracy and also found guilty of causing unregistered Belmont stock to be mailed on July 14, August 6, and October 2, 1959 for the purposes of sale and delivery after sale.

Appellants' main contention is that the stock was exempt from the registration requirements of the Securities Act because it was issued originally in 1919, long before the passage of the Act in 1933. They rely on section 3(a)(1) of the Act, 15 U.S.C. Sec. 77c(a)(1), which exempts from

---

1 A mistrial was declared as to one co-defendant; five corporate co-defendants were tried separately.

registration "any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public,..." But, their dependence on this argument ignores the language of the remaining portion of that sentence, which states, "but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days..." It is undisputed that the sale of Belmont stock to the public was a new offering, and there is little question that appellants were issuers or underwriters. See 15 U.S.C. Sec. 77(b) (11); Securities and Exchange Commission v. Culpepper, 270 F. 2d 241 (2d Cir. 1959). The evidence is overwhelming that they and others acted together to control Belmont Oil thoroughly and completely, and that they knew the stock they sold to various brokers would be resold to the public; in truth, that was their ultimate goal.

Moreover, appellants urge that Judge Palmieri committed reversible error by not charging the jury with respect to the

applicable five-year statute of limitations. This claim is wholly without merit because it is undisputed that the mailings for which appellants were convicted occurred between July 14 and October 2, 1959. Accordingly, the acts occurred within five years of the filing of the indictment on July 14, 1964. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931). Appellants call to our attention, however, that they individually did not commit acts within the statutory period. In this connection, Schwenoha urges that he testified that he withdrew from the conspiracy in March, 1959. But as we noted in United States v. Borelli, 336 F. 2d 376,388 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965), "mere cessation of activity is not enough to start the running of the statute; there must be affirmative action, either the making of a clean breast to the authorities, ... or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." The record is clear that the alleged withdrawal

does not come close to meeting this test; in any event, no exception was taken to the failure to charge on the issue of withdrawal. See F. R. Crim. P. 30; United States v. Kahaner, 317 F. 2d 459 (2d Cir.) cert. denied, 375 U.S. 836 (1963). The evidence of withdrawal being insufficient to raise a question for the jury, a fortiori appellants' motion for acquittal on this ground was properly denied.

We have examined appellants' other claims and find them to be without merit. The judgment is affirmed.

APPENDIX "C"

NO. 31240

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VINCENT SCHWENOHA and
NATHAN SUESS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHARING
ON BEHALF OF NATHAN SUESS

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ABRAHAM TEITELBAUM
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United States Supreme Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VINCENT SCHWENOHA and
NATHAN SUESS,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING
ON BEHALF OF NATHAN SUESS

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS:

May It Please the Court:

Nathan Suess petitions this Honorable Court for a rehearing in this cause under the rules of this Court within the 15 day period of the decision affirming the sentence of the District Court.

Petitioner's grounds are briefly and distinctly stated by counsel as follows:

Appellee has based its entire case on rumors, and upon uncorroborated testimony of another defendant to link appellant with a crime.

This Honorable Court will not send an innocent man to the penitentiary. The writer of this statement firmly believes in the cause of Appellant Nathan Suess, and that he is absolutely innocent of any criminal offense.

The purported crime charged in the indictment is one of conspiracy, and the other of violation of the provisions of the Security Act of 1933.

The Appellee admits that any purported offense committed by the Appellant is barred by the pleas of the five year Statute of Limitations. This is only the minor premise upon which Appellant relies for a complete reversal of this case as dictated by common sense and logic.

The major premise is that Appellant did not sell any security in violation of the Security Act of 1933.

The Appellant did a certain Mr. Bloom a favor by going

to a factoring house and borrowing $10,000.00 on the security which Appellant did not own, and he turned over the proceeds to the real owner, Mr. Bloom. Query! When or where did title to this security pass? It is fundamental that in any sale there must be a transfer of title. This was merely an hypothication of stock and not a sale within the meaning of the Security Act of 1933. Appellee failed to prove any crime against Appellant.

The above is the whole truth and in seeking out the truth, Appellant shall be free.

Emil Zola, in the defense of Dreyfus, stated,

> "When truth is driven underground, it will grow and grow to such luminous proportions, that when it bursts forth it will carry everything asunder."

The animus furandi or criminal intention to commit the crime is entirely lacking as to Appellant Suess.

This Honorable Court was led to believe that Appellant

Nathan Suess joined a conspiracy, and assisted in finding brokers who would sell this worthless stock. This conclusion is not borne out by the evidence. Mr. Suess was never a public relations man. He met the Cantors only once in his lifetime to corroborate the fact that he sold an oil lease for a Mr. Bloom. He was never in the boiler room business. It was common knowledge that Suess was in the business of buying and selling oil leases and options and that he was not in any stock business of any kind.

This confusion arises from the fact that Mr. Samuel Rowe, counsel for Vincent Schwenoha, agreed to represent Mr Suess without any fee because Suess was penniless. In fact, he has appealed under forma pauperis, and the financial situation of Seuss is still desperate and unchanged.

To illustrate the point that Appellant Suess is a victim of guilt by association, counsel for the Appellee stated in his brief on page 8 that Suess sold 100,000 shares to Carlton at 10 cents a share etc., and cites the record. The

examination of the record does not bear out this assertion as a fact. The record is contrary to what counsel for Appellee has stated. The exhibit shows that a check, Gov't. exhibit 149, was made to a Harold Green in the amount of $1200.00. What does this exhibit prove? It is the humble opinion of counsel for Suess that this exhibit was confusing to the Court and to the jury and had no probative value to prove any crime.

Counsel for Appellee on page 9 of his brief stated as a fact that Suess received $2,500.00 from the sale of selling the Belmont stock. The record on page 58a and page 59a, of Government's brief shows that Suess did receive $2,500.00 from a Mr Reiter, but for what? This was not for any commissions on the sale of stock, but for money borrowed (147a, 148a). Finally, the contention, by counsel for Appellee on page 16 of his brief, that Mr. Suess was a partner with Schwenoha, and that he had an agreement for division of the proceeds of the worthless stock, has no

foundation in fact, and should have been stricken from the record. This was highly prejudicial.

Counsel for Appellee has tried to confuse this Honorable Court by taking facts out of context. His appendix is confusing.

Appellee stated in his brief on page 8 that Nathan Suess sold 100,000 shares of stock. This is absolutely not a fact. Nathan Suess borrowed money on stock as an accommodation to Mr. Bloom more than five years prior to this indictment. U.S. Appendix 150a, 151a.

The Decision of the District Court should be reversed as to Nathan Suess.

Respectfully submitted,

/s/ Abraham Teitelbaum
ABRAHAM TEITELBAUM

COUNSEL'S CERTIFICATE

Abraham Teitelbaum hereby certifies that the above petition for rehearing is made in good faith and not for purposes of delay pursuant to 2nd Circuit Rule 25(a):

/s/ Abraham Teitelbaum
ABRAHAM TEITELBAUM

Associate Attorney with
SAMUEL ROWE
for Nathan Suess, Appellant.

EXHIBIT "D"

(1014) * * *

NATHAN SUESS, a defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

* * * * * * *

(1033) * * *

Cross-examination by Mr. Shaw:

Q. Mr. Suess, you remember a man named Ed Cantor who testified as a witness in this case? A. Yes.

Q. You knew him in 1958, did you not? A. I met him once, once or twice.

Q. Was it once or twice? A. I don't recall.

Q. Where did you meet him? A. In his office.

Q. That was an office called Peerless-New York? A. Yes.

Q. In the Empire State Building, correct? A. Yes.

Q. That was a brokerage firm? A. That's right.

(1034) * * *

Q. Do you recall any occasion in 1958 when you visited the Peerless-New York office? A. Yes.

Q. In the Empire State Building, correct? A. Yes.

Q. That was a brokerage firm? A. That's right.

* * * * * * *

(1034) * * *

Q. Do you recall any occasion in 1958 when you visited the Peerless-New York office and spoke to Ed Cantor and told Ed Cantor that you were the public relations man for Belmont Oil? Do you recall that?

A. No, I don't. I can't say truthfully. I don't remember.

Q. Do you deny, sir, that you told Ed Cantor that you were the public relations man for Belmont (1035) Oil?

A. I'm not denying it, but I don't remember ever saying it.

* * * * * * *

(1038) * * *

Q. Did you ever meet a man named Donald Duncan from Globe Securities? A. Yes.

Q. When did you meet him? A. Mr. Hammerling introduced me to him. We were having coffee.

(1039)

Q. The question was when did you meet him?

A. 1958.

Q. Did you discuss Belmont Oil with Donald Duncan?

A. Not to my recollection. Mr. Hammerling did, but not me.

Q. Did Mr. Hammerling discuss it in your presence?

A. I can't remember if he said it in front of me or if he said it before, but I met Mr. Duncan once in a restaurant there.

* * * * * * *

Q. Do you know a man named Morris Reiter?

A. Yes.

(1040) * * *

Q. How many times altogether did you meet Mr. Reiter? A. I met him--he came to Los Angeles on other business.

Q. How many times did you meet him in New York? A. In New York? A few times.

Q. Was Mr. Schwenoha ever with you when you met (1041) Mr. Reiter in New York? A. Yes, once.

Q. Where was that? A. Not only Mr. Schwenoha was with him but Mr. Fox was with him and Mr. Hammerling. We were all together.

Q. When was that? A. We had an occasion to meet him.

Q. There was an occasion in 1958 when you, Mr. Schwenoha, Mr. Fox and Mr. Hammerling all met with Mr. Reiter? A. Yes.

* * * * * * * * *

(1043) * * *,

Q. My next question, Mr. Suess, is on that occasion did you have a discussion concerning Belmont Oil stock? A. Mr. Fox did and Mr. Hammerling did.

* * * * * * * * *

(1044) * * *

Q. Did Morris Reiter ever pay you any money?

A. I saw a check.

Q. My question is: Did Morris Reiter ever pay you any money? A. I borrowed money from Morris Reiter.

Q. When was that? A. Could have been the end of 1958 or 1959. The beginning of 1959. Could have been either.

Q. How much money did you borrow from Morris Reiter? A. I don't believe it was a personal loan.

(1045)

Q. Now, I didn't ask you that, sir.

How much money did you borrow from Morris Reiter?

A. I don't know except--I really don't know. I can't answer that question. I don't know. If I had anything to refresh my recollection I would be too happy to answer.

Q. He gave you cash? A. No.

Q. What did he give you? A. Morris--Mr. Reiter always gave me a check.

Q. A personal check? A. I don't know. If it was a company check, it could have been a company check or whatever it was. If he did give it to me.

Q. But it was a check? A. It was a check, if he did give it to me.

Q. Not a bank draft, a check? A. It could have been a bank draft.

* * * * * * * * *

(1058) * * *

Q. Wasn't there a time late in 1958 or early in 1959 when you and Mr. Fox and Mr. Schwenoha and a man who had been with Mr. Shomberg several days before went together to Carlton Securities? Didn't that happen? A. No. I don't think we went to Carlton. We went to some other place but I don't think it was Carlton.

The Court: Where was it?

The Witness: In New Jersey.

The Court: Jersey City?

The Witness: I don't know the name.

The Court: What was the name?

(1059)

The Witness: I don't know.

The Court: Was it a stockbroker?

The Witness: It was, but not Carlton.

The Court: In Jersey City?

The Witness: In Jersey City.

Q. What were you doing at that stockbrokerage office? A. Somebody took us up there and I just sat down with them.

Q. Who took you up there? A. I don't remember the name.

Q. Fox was there? A. Yes.

Q. Schwenoha? A. Yes. But I don't remember who took us up there.

* * * * * * * * *

(1063) * * *

Q. Back to that trip to Jersey City, do you deny as you sit here today that that was Carlton Securities to which you went today? A. Do I deny it?

Q. Do you deny that it was Carlton Securities to which you went that day? A. Do I deny? I know it was not Carlton Securities because they told me it was not.

Q. I see. A. Not me.

Q. Who was it who told you this is not Carlton Securities? Who told you that? (1064) A. Someone said it.

Q. You were sitting around and out of the clear blue sky someone said, "Nate, this is not Carlton Securities"? A. I don't know who Carlton Securities was when I went there.

Q. I'm asking you who told you that the place you were at was not Carlton Securities? A. I can't recall who said it to me.

Q. But you are sure as you sit here today that

somebody told you that? A. I'm not sure of anything.

Q. Let's get back to Stanley Younger and the Navarro Hotel.

Did there come a time in the spring of 1959 when you met Stanley Younger at the Navarro Hotel? A. Yes.

Q. Was Taylor there? A. Taylor was there first.

Q. Was Shomberg there? A. Shomberg came up later. He always visited.

Q. Did you, Taylor, Younger and Louis Shomberg have a conversation that day at the Navarro Hotel? (1065) A. I had a conversation with Mr. Taylor. Then Younger came in. Mr. Shomberg was talking to somebody else. There was a couple of people up there. He was not in on the conversation.

Q. Was Mr. Shomberg in the room? A. Mr. Taylor--

Q. The question is was Mr. Shomberg in the room? A. He was in the room.

Q. Who else was there? A. Taylor, Mr. Younger.

Q. And you? A. Mr. Heyman, and I believe another party.

Q. Who? A. I don't remember the other party. I know that conversation distinctly--not distinctly, I can't remember a lot of it.

Q. Was there a conversation in that room that afternoon when you were present, when Shomberg was present, when Taylor was present and when Younger was present, about Belmont Oil Corporation? Yes or no.

A. Yes.

Q. Tell us what the conversation was.

* * * * * * * * *

(1067) * * *

A. Mr. Taylor said to me, that's what I tried to say at the beginning, he said, "I understand you have 100,000 shares."

I says, "I do, but it don't belong to me. It's up in Judson Financing Company."

He asked me what I wanted to do with it and Younger was sitting there and I said, "I don't care what they do with it. It don't belong to me. I have not the $10,000 and the interest money to pay for it. It don't belong to me."

Q. Go ahead. A. Then Younger left. He says, "I will talk (1068) to you further." And he left. Words to that effect.

Q. Did you agree with Younger that day to sell to him 100,000 shares of Belmont stock? A. I didn't agree to anything.

Q. So your answer is no? A. I didn't agree to anything. As far as I can recall I didn't agree to anything. I just told him it was up at the financial company. That's the only 100,000 shares that is in my name and it belonged to Mr. Bloom.

Q. Did you ever deliver 100,000? A. I never took the stock out. I never delivered anything.

(1089) * * *

Q. Is it your testimony that you never participated in any deal to sell Belmont Oil stock to Carlton Securities? Yes or no. A. No. I never participated to sell them any stock.

Q. Did you ever receive any money on any sale of stock to Carlton Securities? A. So far as I can remember, no.

Q. Do you know a man named Harold Green? A. I don't believe I do.

Q. Did you ever know a man named Harold Green? A. I don't believe I do know him. If I seen him I would be able to say yes or no.

(Government's Exhibit 149 marked for identification.)

Q. Mr. Suess, I show you 149 for identification. I direct your attention to the back of that. Look at the back for the moment and I ask you if (1090) that's your signature. A. It looks like mine.

Q. Do you have any doubt about it? Look at the back and not the front. Is it or is it not your signature, Nate Suess? A. That does not look like my signature. I never sign my name that way.

Q. I am directing your attention to the words that I am pointing out, "Nate Suess." Is that your signature? A. It looks like mine.

Q. Is it? A. I don't think I write an N this way.

Mr. Shaw: Please mark these for identification.

(Government's Exhibit 150 marked for identification.) (1091)

Q. Mr. Suess, you testified that you stayed on a number of occasions in the spring of 1959 at the Hotel Navarro, is that right? A. That's right.

Q. Look at the signature on those cards and tell us if those are your signatures. A. Yes, that is my signature.

Q. That is the same signature that appeared on the back of Exhibit 149, is it not? It is your signature, isn't it? A. It looks like it.

(1092) * * *

(Government's Exhibits 149 and 150 for identification received in evidence.)

Q. You testified under oath here that you never got any money from Carlton Securities, is that right?

A. That's right.

Mr. Shaw: Ladies and gentlemen, Government's Exhibit 149 is a check drawn on the First National Bank of Jersey City, New Jersey, dated May 4, 1959, stamped at the top Carlton Securities and the check is payable to Harold Green in the amount of $1200, signed Edward J. McDonald as authorized signature, the signer on behalf of Carlton.

On the back it bears the endorsement Nathan Suess. On the other side it says at the top "Harold Green" and below "Credited to the account of Nathan Suess.

* * * * * * * *

APPENDIX "E"

(3)

Mr. Shaw: Next, your Honor, the indictment itself as it applies to these three defendants, first of all, since the defendants charged in this indictment as operators of brokerage houses have all entered pleas of guilty, the government does not intend in this trial to prove any of the substantive counts which charge violation of Section 17 of the Securities Act. That means at this time the government moves to sever from the trial of this (4) case Counts 23 through 44, which are the counts specifically charging fraud in the sale of securities.

In the interest of saving time and avoiding proof which directly relates only to those who pleaded guilty, we are moving to sever those counts.

The Court: Very well, the motion is granted.

Mr. Shaw: The next point is the conspiracy charge in the indictment is, of course, a conspiracy to violate

only Section 5, the sale of unregistered securities, but also Section 17.

A number of paragraphs in the conspiracy indictment describe the charge against all these defendants of conspiring to defraud as well as conspiring to sell the securities of Belmont Oil without registration with the Securities and Exchange Commission.

Also, in the interest of saving time, the government does not intend in this case to prove substantially a conspiracy to defraud. Principally this case will charge and prove a conspiracy to sell this stock without registration with the Securities and Exchange Commission.

I do not mean by saying this to limit the government from proving any conspiratorial acts to (5) defraud. However, we have problems with victim witnesses around the country. We may not finally get the people who would testify to the actual fraudulent statem ents and therefore in my opening statement I do not intend to refer to this

as anything other than a conspiracy to violate Section 5 and I merely want to call to your Honor's attention the fact that paragraphs 4, 5, 6 7Q and 7R of this indictment allege it was part of the conspiracy that the defendants would defraud the public in the sale of stock by making false statements.

If your Honor intends in his opening remarks to the jury to outline a bit for them what the indictment is about, I would suggest it might be well not to go into this because the government, as it need not, will not be proving that part of the conspiracy in this trial. I don't intend to refer to it in my opening.

* * * * * * * * *

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286-233—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 816

NATHAN SUESS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 845

VINCENT SCHWENOHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 7072–7075; Pet. No. 816 App. B; Pet. No. 845 App. B) is reported at 383 F. 2d 395.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1967. In No. 816, a petition for

rehearing was denied on October 16, 1967, and a petition for a writ of certiorari was filed on November 14, 1967. In No. 845, a petition for rehearing was denied on October 26, 1967, and the petition for a writ of certiorari was filed on November 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the stock sold by petitioners was exempt from the registration requirements of the Securities Act.

2. Whether the district court erred by not instructing the jury with regard to the statute of limitations.

3. Whether the district court's charge to the jury contained reversible error (No. 845 only).

STATUTES INVOLVED

15 U.S.C. 77b (Section 2 of the Securities Act of 1933) provides in pertinent part:

> When used in this subchapter, unless the context otherwise requires—
>
> * * * * * *
>
> (4) The term "issuer" means every person who issues or proposes to issue any security * * *;
>
> * * * * * *
>
> (11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any secu-

rity, or participates or has a direct or indirect participation in any such undertaking * * *. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

15 U.S.C. 77c (Section 3 of the Securities Act of 1933) provides in pertinent part:

> (a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:
>
> (1) Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days * * *.

15 U.S.C. 77d [1] (Section 4 of the Securities Act of 1933) provides in pertinent part:

> The provisions of section 77e of this title shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; transactions

[1] The excerpt from 15 U.S.C. 77d is printed as it appeared between 1954 and 1964.

by an issuer not involving any public offering * * *.

15 U.S.C. 77e (Section 5 of the Securities Act of 1933) provides in pertinent part:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> * * * * *
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Southern District of New York, under five counts of an indictment charging that they and others[2] conspired to send, and did send, unregistered common stock of the Belmont Oil Corporation through the mails for purposes of sale or delivery after sale, in violation of Section 5(a) of the Securities Act of 1933, 15 U.S.C. 77e(a). On March 7, 1967, petitioner Suess was fined a total of $1,500 and was sentenced to imprisonment for fifteen months on each of the five counts, the sentences to run concurrently (R. 1998). Petitioner Schwenoha was fined a total of $2,500 and was sentenced to five concurrent

[2] Prior to trial, ten of the individual codefendants entered pleas of guilty. The charges against five corporate codefendants were severed. One individual codefendant was tried with petitioners, but the jury was unable to reach a verdict as to his guilt.

terms of three years' imprisonment (R. 1997). The court of appeals affirmed the convictions.

In 1956, petitioner Schwenoha acquired all the outstanding stock—350,000 shares—of the Belmont Divide Mining Corporation, an assetless enterprise which had been defunct for over thirty years (R. 85–87, 190, 192). Schwenoha thereafter engaged one Joel Fox, a customer's man in a Los Angeles brokerage house, to find a buyer for the company (R. 187–190).

In the fall of 1957, Schwenoha and Fox entered into an agreement with a Dr. James Boren, under which Belmont Divide would change its name to Belmont Oil Corporation and Boren would transfer certain oil leases of unspecified value to the corporation in return for 300,000 shares of its outstanding stock and one-half of a proposed new issue of 325,000 shares. Schwenoha and Fox were to divide the remaining 50,000 outstanding shares and to receive the other half of the proposed issue. Schwenoha and Fox were to arrange for the sale of the Belmont stock to the public (R. 89–96, 191–196). When Boren asked about the requirement of registering the stock, Schwenoha told him not to worry about it; that he "had a lawyer who would write a letter saying that since this company * * * had been originally organized prior to the 1933 Securities * * * Act that the stock could be sold to the public without registration" (R. 91, 194). Schwenoha suggested that "for further safeguard against any possible trouble" the stock be placed in the names of nominees, "so that no individual will appear * * * to own as much as ten percent of this stock" (R. 91, 95–96). It was also agreed to split the stock ten for one in order

to have more shares to sell to the public (R. 97, 196–197).

Thereafter the original 350,000 shares were registered in the names of nominees of Schwenoha, Fox, and Boren, the nominees endorsed the certificates in blank and returned them to the owners, and the shares were split ten for one (R. 98–106, 108, 196, 206–207).[3]

In February 1958, Schwenoha and Fox asked Boren to turn over to the company some additional oil leases "to help the sale of the stock." Boren delivered some leases, the value of which was not discussed, in return for 1,750,000 shares of the newly-issued split shares (R. 108–109).

In the spring of 1958, Schwenoha introduced Fox to petitioner Suess (R. 202). Suess thereafter met with two representatives of a New York brokerage firm, described himself as the "public relations man for Belmont Oil," and proposed that the firm maintain a market in Belmont Oil stock and sell the stock to the public (R. 607–609). Suess later returned to the brokerage firm with Schwenoha and Fox, and Schwenoha turned over to the firm 100,000 shares of Belmont Oil stock which had been registered in the names of Schwenoha's nominees. The firm gave Schwenoha notes for $25,000, to be redeemed as the firm sold the stock (R. 213–218, 609–615). The firm then sold the shares to the public at prices ranging between seventy-five cents and one dollar a share (R. 616).

[3] The certificates representing the new issue, as opposed to those representing the original 350,000 (later 3,500,000) shares, were placed in escrow in a bank and were not sold to the public (R. 131–132).

In September 1958, Suess asked Fox for some publicity material to aid the New York brokerage firm in selling Belmont stock. Fox and Schwenoha drafted a letter falsely reporting the recent acquisition of California oil leases by the company. Suess, who knew that no such acquisitions had taken place, delivered the letter to the firm. A few weeks later the firm requested more stock to sell to the public, and Schwenoha delivered another 50,000 shares (R. 509–511, 523–526, 615–616).

On October 13, 1958, Boren informed Schwenoha and Fox that an injunction had been issued against him in connection with the sale of unregistered stock of another company and that he wanted to sever his connections with Belmont Oil (R. 112, 114, 368–371). When Schwenoha referred to the letter he had obtained from a lawyer stating that the Belmont stock was exempt from the registration requirements, Boren's attorney, a former S.E.C. lawyer, told Schwenoha and Fox that the opinion was not "worth the paper it was written on" and that any sale of Belmont stock by Fox or Schwenoha "would be a violation of Section 5 of the Securities Act" (R. 114, 372–373). Fox purchased Boren's entire holdings—over 1,000,000 shares of the split, original issue, and title to over 2,500,000 shares of the split, new issue which was being held in escrow—for $1,000 in cash and a note for $39,000[4] (R. 114, 118, 226–228, 372). Fox assumed the position of president of Belmont Oil, a title which previously had been held by Boren's son,

[4] No payments were ever made on the note (R. 117, 228).

and thereafter took care of the company's bills and correspondence under a partnership arrangement with Schwenoha (R. 99, 198, 200–204).

In late October 1958, Fox gave Schwenoha 724,000 shares to be sold by Schwenoha and Suess through various New York brokers, with an agreement that the proceeds would be divided among the three of them. They re-registered 300,000 of the shares in the name of a friend of Suess, who signed the certificates and immediately returned them (R. 231–237, 252–253, 669–672).

In November 1958, Schwenoha, Fox, and Suess met with a second New York City stockbroker who had expressed an interest in selling Belmont stock. The broker eventually sold some of the shares, and delivered to Suess a bank draft for $2,500 from the proceeds (R. 240–245).

In January 1959, Schwenoha sold 10,000 shares of Belmont stock at twenty-five cents a share to one Binstock, a New York broker who proposed to resell the shares on the market. Over the course of the next few months Binstock bought from Schwenoha and resold over 200,000 additional shares at an average resale price of about one dollar a share (R. 720–739, 759).

In the spring of 1959, Suess delivered 100,000 Belmont shares to a New Jersey stockbroker under an agreement that the broker would pay Suess at the rate of ten cents a share as he resold them (R. 224, 849–852, 907–912). The broker resold the shares to the public at prices of one dollar a share and more (R. 859).

In June 1959, Schwenoha and Fox induced one Thomas Craig to buy Fox's remaining Belmont shares on the basis of Schwenoha's statement "that he had a market going in Belmont Oil stock, that the stock was being sold by brokers in New York" at about one dollar a share. On July 20, 1959, Craig and Fox signed a contract of sale calling for the payment of $40,000 in return for over 3,000,000 Belmont shares. Craig never made the payment specified (R. 563–567).

Between July 14, 1959, and October of that year, on or about the dates specified in the counts upon which petitioners were convicted, various brokers to whom petitioners had delivered Belmont stock certificates mailed the certificates to their customers (R. 810, 894–895, 960–962).

ARGUMENT

1. There is no merit to petitioner's contention that the Belmont stock was exempt from the registration provisions of the Securities Act. Although Section 3(a)(1) of the Act exempts from registration any security which had been "sold or disposed of by the issuer or bona fide offered to the public" prior to 1933, it also provides that this exemption shall not apply to any subsequent "new offering of any security by an issuer or underwriter." The redistribution of substantial blocks of the original stock of the corporation in the circumstances of this case plainly constituted a new offering within the meaning of the statute. See *In the Matter of Ira Haupt & Com-*

pany, 23 S.E.C. 589; H. Rep. No. 85, 73d Cong., 1st Sess., p. 14. Since petitioner Schwenoha exercised control of Belmont (whether individually, or collectively with Boren and Fox), he was an "issuer" of its stock; since petitioners Suess and Schwenoha sold the stock in connection with its distribution, they were "underwriters." See 15 U.S.C. 77b(11); *Securities and Exchange Commission* v. *Culpepper,* 270 F. 2d 241 (C.A. 2). As noted by the court of appeals, "[t]he evidence is overwhelming that [petitioners] and others acted together to control Belmont Oil thoroughly and completely, and that they knew the stock they sold to various brokers would be resold to the public; in truth, that was their ultimate goal" (Pet. No. 816 App. B, p. 17; Pet. No. 845 App. B, p. 30).

2. Petitioners contend that the trial court erred by not instructing the jury with regard to the applicable five-year statute of limitations. They argue that the government's evidence showed that they personally had not committed the single overt act presented to the jury as evincing the conspiracy or the acts constituting the substantive offenses within the five-year period preceding the filing of the indictment on July 14, 1964. This argument was properly rejected by the court below. The broker's mailing of a certificate, charged in overt act number 25, occurred in the first week in August, 1959 (R. 810), and the mailings charged in the four substantive offenses (counts 2, 12, 17, and 18) occurred between July 14, 1959 and October of 1959 (R. 894–895, 960–962), all

within the five-year period.[5] The statute began to run as to petitioners for each offense from the date of those acts, whether committed by petitioners personally or by their co-conspirators or agents. *Fiswick* v. *United States,* 329 U.S. 211, 216; *Pinkerton* v. *United States,* 328 U.S. 640, 645–648; *United States* v. *Reina,* 242 F. 2d 302, 306–307 (C.A. 2), certiorari denied *sub nom. Moccio* v. *United States,* 354 U.S. 913; *United States* v. *Witt,* 215 F. 2d 580, 584 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States,* 348 U.S. 887.

Petitioner Schwenoha further argues that the lack of evidence of his active participation on or after July 14, 1959, established his withdrawal from the conspiracy prior to that date. Mere cessation of activity, however, without a communication of withdrawal to the co-conspirators or a disclosure to the authorities, is not enough to start the running of the statute. *Hyde* v. *United States,* 225 U.S. 347, 369; *United States* v. *Borelli,* 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States,* 379 U.S. 960. In the absence of any evidence of such a communication or disclosure,[6] there was no occasion for the district court to instruct the jury, *sua sponte,* on the issue of withdrawal, and Schwenoha did not

---

[5] The count specifying a mailing on July 14, 1959, five years to the day before the filing of the indictment, was within the five-year period. *Burnet* v. *Willingham Loan and Trust Company,* 282 U.S. 437.

[6] The record references set out in petitioner Schwenoha's petition (Pet. No. 845, p. 10) show no such communication or disclosure.

object to the instructions on this ground. See F. R. Crim. P., Rule 30.

3. Petitioner Schwenoha alleges that the district court's charge to the jury contained prejudicial error because it failed adequately to explain the statute and to include matters favorable to him in the resume of the evidence. Schwenoha also argues that the issue concerning his reliance on the lawyer's letter (stating that the stock was exempt from the registration requirements) was presented in such a way as to compel the jury to find that he had violated the statute (Pet. No. 845, pp. 21–24). None of these allegations has substance. The court carefully and accurately explained the meaning of the statute and its specific terms (R. 1598–1606), and it summarized the evidence favorable to Schwenoha at each relevant point (R. 1538–1539, 1541–1542, 1560–1563, 1565–1566, 1603). On the issue of Schwenoha's reliance on the lawyer's advice, the court merely instructed that the advice was incorrect to the extent that it stated a pre-1933 issue was entirely exempt from registration (R. 1561–1562). After the court had given its instructions to the jury, petitioner's attorney stated that his "only exception" was that the court seemed to have emphasized the government's evidence at the expense of the evidence presented by the defense (R. 1634). The court then charged the jurors that it had not attempted to review all of the evidence before them, but that all the evidence was to be considered in reaching their verdict (R. 1635).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

VINCENT SCHWENOHA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Vincent Schwenoha, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled cause on October 26, 1967.

CITATIONS TO OPINION BELOW

The petition for rehearing before the United States Court of Appeals was denied, as set forth in Appendix A.

The opinion of the Court of Appeals, Second Circuit, of September 28, 1967 is set forth verbatim in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2) Rules of the Supreme Court and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Did the statute of limitations bar prosecution on all counts? The trial court failed to give instructions to the jury as to the defense of the statute of

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QUESTIONS PRESENTED

1. Did the statute of limitations bar prosecution on all counts? The trial court failed to give instructions to the jury as to the defense of the statute of

limitations. This implied a rejection by the court of so important a defense for the consideration by the jury when the petitioner presented cogent evidence that he had been completely disconnected with any member of Belmont Oil Corporation in March 1959, more than five years prior to the indictment which was filed July 14, 1964.

2. Whether a sale of the petitioner's personal stock which was of the original issue of the Belmont Divide and Mining Company (later changed name to Belmont Oil Corporation) which stock was issued in 1919 long prior to the Securities Act of 1933, Section 3, had been exempt from registration by law?

3. May a personal transaction of the personal stock of the petitioner, said stock being the original issue of stock, issued in 1919 by its issuer, be declared

criminal when the statute specifically exempts such transaction under the Securities Act of 1933, Section 4, which has to do with exempted transactions where there had never been a public offering by the petitioner?

4. May a criminal conviction be predicated on evidence where there had been no illegal sale of stock, or illegal transaction, when said items are exempt from registration?

5. Where substantial errors of constitutional magnitude were committed by the court and the court failed to clarify to the jury by proper interpretation, as well as misapplying the interpretation of the Security Act of 1933 as amended, with specific reference to Sections 3, 4 and 5 of the rules and regulations, is Petitioner entitled to a reversal?

STATEMENT

Petitioner was charged and tried on five counts in an indictment filed in the Southern District of New York in violation of 77e(a), 77g(a) and 77x of U.S. Code and sections 1341, 1343 of title 18 of U.S. Code which has to do with the sale of unregistered stock of Belmont Oil Corporation through the use of mails. Count 1 is the usual conspiring count. Counts 2, 12, 17 and 18 deal with the use of mails in the sale of unregistered stock.

Originally there were 18 defendants charged in the indictment prior to the actual trial. All pleaded guilty except your petitioner, Vincent Schwenoha, Nathan Seuss and Louis Shomberg, who was discharged because a mistrial was declared as to him.

After trial, your petitioner, Vincent Schwenoha, was convicted on counts 1, 2, 12, 17 and 18, and sentenced to a term of 3 years on all counts to be served concurrently together with a fine of $500.00 on each count totalling $2500.00. (R.T. 19, 20)*

The indictment charges that Vincent Schwenoha together with other defendants conspired to sell unregistered stock of Belmont Oil Corporation in violation of the Securities Act of 1933. The government, in its opening statement, said, "the government will prove a conspiracy to sell unregistered stock of Belmont Oil Corporation and not a conspiracy to defraud." (R.T. 4)

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* References hereinafter made to the Clerk's transcript will be designated "C.T.", and to the Reporter's transcript as "R.T.".

Belmont Divide Mining Company was organized in the year 1919 under the laws of the state of Nevada. In or about November 1957 the name was amended to read Belmont Oil Corporation. An assessment sale of stock which was originally issued in 1919 was made at a sheriff's sale. Your petitioner purchased a portion of this stock for $3000.00 on September 14, 1956. (R.T. 1113, 1114) (C.T. exh. O)

James Boren purchased the Belmont Oil Corporation, and acquired all the unissued stock which was placed in escrow with a bank, as well as the original issue of the stock of the company made prior to 1919. Your petitioner was permitted to keep his 50,000 shares of this original issue. (R.T. 131, 132). It is this stock alone which became the issue involved in the indictment against the petitioner, and,

the sale of which he made to individuals to acquire needed money for another project.

Mr. Boren held a stockholder's meeting in February 1958 in Houston, Texas. At this meeting he called upon Mr. Crowell, the attorney for Belmont Oil Corporation, who had been a former judge and thoroughly familiar in security matters. Mr. Crowell declared that the said 350,000 original issue of stock did not have to be registered, of which your petitioner owned 50,000 shares. Mr. Boren and all the stockholders relied on this opinion, and, Mr. Crowell placed it in writing for the corporate records. (R.T. 1124) (C.T. A99 Def. Ex. B)

Your petitioner never occupied any position within the management of the corporation. He was a stockholder. He

later sold his stock in order to acquire money for the purpose of marketing a safety device brake for trucks. This sale is contended by the government to be in violation of the Securities Act of 1933. (F.T. 497, 1154) (C.T. Alll--exh. F)

REASONS FOR GRANTING THE WRIT

1. The Statute of Limitations barred prosecution on all counts. The government never established that the petitioner committed an overt act within the statute of limitations. The stipulations agreed to in open court are to be interpreted in a light most favorable to the petitioner. (2 C.A.) (U.S. v. Altanese 123 F. Supp. 732, aff'd. 224 F 2d 879)

The case record reveals that petitioner withdrew from the Belmont Oil Corporation to the knowledge of everyone in March

1959, and, if any conspiracy exists toward others by their admissions, it is of no effect upon the petitioner. (R.T. 1161, 1154 to 1156, 611 and 659)

The period of the statute of limitations is material and relevant as a matter of law wherein this petitioner is involved. The court was required to present this to the jury for their determination of fact, especially in relation to the overt act charged against the petitioner. This is reversible error. No person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found within five years next after such offense shall be committed. (R.T. 1483) (68 Stat. 1145 - 1 Sept. 1954, ch. 214, Sec. 10(a)).

The court failed to give any instructions to the jury as to the defense of the statute of limitations. A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in evidence.. Since this affirmative defense was promptly raised, and was not presented to the jury, this implied a rejection by the court of so important a defense for consideration where evidence had been submitted of the petitioner's withdrawal in March 1959.

The trial judge's charge failed to focus the attention of the jury on whether the individual defendants had knowingly continued any illegal acts, if any were committed, within the five year statute of limitations preceding the indictment. The prosecution in lumping 18 defendants

the sale of which he made to individuals to acquire needed money for another project.

Mr. Boren held a stockholder's meeting in February 1958 in Houston, Texas. At this meeting he called upon Mr. Crowell, the attorney for Belmont Oil Corporation, who had been a former judge and thoroughly familiar in security matters. Mr. Crowell declared that the said 350,000 original issue of stock did not have to be registered, of which your petitioner owned 50,000 shares. Mr. Boren and all the stockholders relied on this opinion, and, Mr. Crowell placed it in writing for the corporate records. (R.T. 1124) (C.T. A99 Def. Ex. B)

Your petitioner never occupied any position within the management of the corporation. He was a stockholder. He

court, the prosecution and the defense-- the deaths of Mr. Crowell, attorney for Belmont Oil Company, Mr. Naismith, the registration agent of the stock and Edward Gallicia, attorney in New York, counsellor for the Cantor brothers, and, Max Hammerling, an extremely material witness who suffered a heart condition. (United States v. Borelli 336 F 2d 376, 388) (2 C.A.) (Chaifetz v. U.S. (1960) 288 F 2d 133)

Sharp issue is taken with the portion of the opinion of Judge Kaufman on page 11, of the Circuit Court of Appeals, Second Circuit, wherein it is contended that, the defense of the statute of limitations in behalf of the petitioner is without merit. The trial judge must be especially careful to charge the jury in its effect, in relation to the facts of the case. Under a

plea of not guilty, the last overt act of the petitioner must be specifically shown, as well as the fact that the petitioner completely disconnected himself with any conspiracy. A jury is entitled to be charged to this effect, especially within the security of the presumption of innocence. This would be prejudicial error requiring reversal. The court denied the motions timely made for the dismissal prior to the court's charge, and, again after the jury's verdict (R.T. 1483). The constitutional rights of the petitioner were materially affected in preventing the jury to determine whether there had been a continuous cooperation with co-conspirators, and, whether the petitioner separated from the conspiracy in March 1959, to the knowledge of all concerned.

Under Federal Criminal Rules, Rule 30, which deals with security involving life and liberty. An appellate court may notice plain and seriously prejudicial error in the trial court's instruction to the jury, even though the error had not been called to the attention of the trial court. (Chapman v. California (Feb. 22, 1967) 176 F 2d, 705) (U.S. v. O'Connor 237 F 2d, 466).

The court should have charged the jury, that any acts prior to July 14, 1959 were not connected, or could not be considered in determining guilt. The jury could have found that the petitioner herein was exonerated. In the case of U.S. v. Borelli, 336 F 2d 376, (2 CA)(1964) states in effect, "that the question of whether there was an affirmative act of withdrawal should have been submitted to the jury,

and, it is reversible error not to do so."

2. The decision of the Court of Appeals, Second Circuit, in the instant case deals with an important question, to wit, the effect of converting a legal act into an illegal act in defiance of the legislative intent in the passage of Section 3(a)(1) of the Act, 15 U.S.C. 77c(a)(1), which exempts from registration "any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, --- but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days ----"

The contention of the petitioner in that the sale of his personal stock in

opportunity to become part of a conspiracy is insufficient to establish the petitioner's guilt as part of that conspiracy. (18 U.S.C. sec. 500, 641) sec. 321. (Causey v. U.S. - 352 F 2d 203)

Any agreement honest and lawful on its face must be treated as such until it is shown to be otherwise by positive evidence. A penal statute is one that punishes and must be strictly construed in favor of, not against, the person brought into court to answer an alleged inffaction. Over repeated objections, an inordinate mass of irrelevant evidence was presented by the government as to collateral transactions and its alleged background, resulting in a denial of a fair trial. This is especially pronounced where fraud was not alleged or to be proved.

3. There had been other substantial

The petitioner's stock has always been known in the trade as "free stock" and not subject to any impediment of being required to be registered with the Security Exchange Commission. (Sec. 3 - Security Exchange Rule). Sale of such stock is not considered to be a new offering even though it was devaluated to one cent a share. The character of the stock as "original issue" had never changed, and, therefore outside of the statute. This exemption under the Act includes as well brokers' transactions executed upon a customer's order, or any exchange, or, in the open or over the counter market. (Securities Act of 1933, Sec. 4(1)(21) Furthermore, the government never proceeded to develop its case on the theory of fraud, but, merely on the technical violation in selling unregistered stock.

Ordinarily a person cannot be guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. (U.S. v. Crimmins 133 F 2d 271, 272 (2 Cir. 1941)

The Southern District Court of New York treated the petitioner as being involved in a conspiracy to sell unregistered stock, and, treated the overt act No. 25 as including the petitioner. The court never submitted to the jury for its consideration, the fact that the petitioner abandoned, or, had withdrawn from any conspiracy. It is the jury who acts as a check upon the judicial feelings of a judge permitting unsophisticated minds to decide the facts.

The interpretation of the statute is of vital concern especially in explaining

to the jury what stock must be registered; and, permitting the jury to decide the fact, whether or not the petitioner's stock involved in this case is the original issue by the issuer prior to the creation of the Act, and, therefore exempt from registration. Conspiracy may not be inferred from mere association. It is the duty of the trial judge to guard against such a possibility by scrutinizing the evidence as to each of the several defendants before submitting the case to the jury, although the burden of establishing withdrawal from any conspiracy is on the petitioner who asserts it. (U.S. v. Hickey - 360 F 2d 127) (Hayes v. U.S. - 329 F 2d 209)

Evidence merely proving that by association with guilty parties, and, that the petitioner may have had an

opportunity to become part of a conspiracy is insufficient to establish the petitioner's guilt as part of that conspiracy. (18 U.S.C. sec. 500, 641) sec. 321: (Causey v. U.S. - 352 F 2d 203)

Any agreement honest and lawful on its face must be treated as such until it is shown to be otherwise by positive evidence. A penal statute is one that punishes and must be strictly construed in favor of, not against, the person brought into court to answer an alleged infraction. Over repeated objections, an inordinate mass of irrelevant evidence was presented by the government as to collateral transactions and its alleged background, resulting in a denial of a fair trial. This is especially pronounced where fraud was not alleged or to be proved.

3. There had been other substantial

error of constitutional magnitude requiring a reversal of conviction:

(a) There had been inadequate explanation of such a difficult statute by the trial court in relation to the attending facts and circumstances. Evidence that merely cast suspicion on the petitioner is not enought to sustain conviction. (U.S. v. Anderson - 352 F 2d 500)

(b) The trial judge, when reciting the evidence to the jury, eliminated from the jury's consideration the fact that after January 9, 1959 there had been a complete change of ownership and control of Belmont Oil Corporation which served to exempt any sales made by the petitioner from the interdiction of the Securities Act and rendered the sales lawful. (R.T. - 572, 987, 988, 989, 991,

992, 993) (C.T. exh: J, K, L, M.)

(c) The trial court charge to the jury presented a biased contention strongly favorable to the prosecution by failing to apprise the jury of evidence favorable to the petitioner. The court created an atmosphere that the petitioner was presumed to be more knowledgable as to the vagaries of the law involved herein and to be superior to the legal experts or even the court itself. This has all the earmarks of a mistrial.

(d) The court charged the jury that the legal opinion given to the petitioner by the attorney for the Belmont Oil Corporation was incorrect law and that there was no exemption for securities issued prior to 1933. The judge took away from the jury the factual effect of the legal counselling given to the petitioner in relation to the

registration of the stock. This seriously borders upon "wilfullness" in relation to intent to commit a crime. This interpretation inferentially imparts to the jury that they are to find a verdict of guilty because there are no facts to consider in the case.

(5) Max Hammerling is a material and vital witness in this case. Truth is the aim of justice. There is no document in evidence as to the status of Mr. Hammerling except a lawyer's statement. His testimony is necessary to vindicate the petitioner. A deposition would have been of value if it could be acquired. (R.T. - 804, 805, 1009, 1010, 1011, 1012)

CONCLUSIONS

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Samuel Rowe
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Morton Binstock, et al.,

Defendants,

Vincent Schwenoha and Nathan Suess,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Vincent Schwenoha,

Upon consideration thereof, it is

Ordered that said petition

for rehearing be and it hereby is denied.

It is further ordered that the issuance of the mandate be stayed pursuant to Rule 28(c) and that bail be continued pending the filing of a petition for a writ of certiorari.

/s/ LEONARD F. MOORE

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

Circuit Judges

October 26, 1967

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 71--September Term, 1967.
Argued September 25, 1967
Decided September 28, 1967
Docket No. 31240

UNITED STATES OF AMERICA,
Appellee,

-v-

VINCENT SCHWENOHA and NATHAN SUESS,
Appellants.

Before:
MOORE, SMITH and KAUFMAN,
Circuit Judges.

Appeal from Judgments of conviction for violating and conspiring to violate the Securities Act of 1933, 15 U.S.C. §77a, et seq.

Affirmed.

Frederick F. Greenman, Jr., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, Robert G. Morvillo, Pierre N. Leval, Assistant United States Attorneys, of counsel), for appellee.

Samuel Rowe, New York, N.Y., for appellants.

KAUFMAN, Circuit Judge:

This appeal reveals a typical stock fraud upon the public which the Securities Act of 1933, 15 U.S.C. §77a, et seq., was designed to prevent. Vincent Schwenoha purchased in 1956 all the outstanding stock of the Belmont Divide Mining Corporation, a paper corporation that had ceased doing business in 1924. He and others devised a plan to sell this worthless stock to the public without registering it with the Securities and Exchange Commission. The corporation's name was changed to Belmont Oil Corporation, certain oil leases of unspecified value were given to the corporation to create the appearance of assets, the stock was split ten for one to create more shares to sell to the public and placed in the names of nominees to conceal the fact of control by a handful of conspirators. Nathan Suess then joined the conspiracy and assisted in finding brokers who would sell the worthless stock to the naive and trusting public. Calling himself the public relations man for Belmont Oil, Suess met with co-defendants Edward Cantor and Michael Canter at the office of their brokerage firm, Peerless-New York, Inc., and arranged for them to maintain a market for Belmont stock and also to sell the stock to the public. These and other brokers sold Belmont to the public for about one dollar per share by typical boiler-room methods. Eight co-defendants pleaded guilty;[1] appellants were convicted by a jury of conspiracy and also found guilty of causing unregistered Belmont stock to be mailed on July 14,

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[1] A mistrial was declared as to one co-defendant; five corporate co-defendants were tried separately.

August 6, and October 2, 1959 for the purposes of sale and delivery after sale.

Appellants' main contention is that the stock was exempt from the registration requirements of the Securities Act because it was issued originally in 1919, long before the passage of the Act in 1933. They rely on section 3(a)(1) of the Act, 15 U.S.C. §77c(a)(1), which exempts from registration "any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public,..." But, their dependence on this argument ignores the language of the remaining portion of that sentence, which states, "but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days..." It is undisputed that the sale of Belmont stock to the public was a new offering, and there is little question that appellants were issuers or underwriters. See 15 U.S.C. §77(b)(11); Securities and Exchange Commission v. Culpepper, 270 F.2d 241 (2d Cir. 1959). The evidence is overwhelming that they and others acted together to control Belmont Oil thoroughly and completely, and that they knew the stock they sold to various brokers would be resold to the public; in truth, that was their ultimate goal.

Morecver, appellants urge that Judge Palmieri committed reversible error by not charging the jury with respect to the applicable five-year statute of limitations. This claim is wholly without merit because it is undisputed that the mailings for which appellants were convicted occurred

for rehearing be and it hereby is denied.

It is further ordered that the issuance of the mandate be stayed pursuant to Rule 28(c) and that bail be continued pending the filing of a petition for a writ of certiorari.

/s/ LEONARD F. MOORE

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

Circuit Judges

October 26, 1967

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Affirmed.

Frederick F. Greenman, Jr., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, Robert G. Morvillo, Pierre N. Leval, Assistant United States Attorneys, of counsel), for appellee.

Samuel Rowe, New York, N.Y., for appellants.

between July 14 and October 2, 1959. Accordingly, the acts occurred within five years of the filing of the indictment on July 14, 1964. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931). Appellants call to our attention, however, that they individually did not commit acts within the statutory period. In this connection, Schwenoha urges that he testified that he withdrew from the conspiracy in March 1959. But as we noted in United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965), "mere cessation of activity is not enough to start the running of the statute; there must be affirmative action, either the making of a clean breast to the authorities,...or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." The record is clear that the alleged withdrawal does not come close to meeting this test; in any event, no exception was taken to the failure to charge on the issue of withdrawal. See F.R. Crim. P. 30; United States v. Kahaner, 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963). The evidence of withdrawal being insufficient to raise a question for the jury, a fortiori appellants' motion for acquittal on this ground was properly denied.

We have examined appellants' other claims and find them to be without merit. The judgment is affirmed.